Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

PORTER COUNTY PLAN COMMISSION and COUNTY OF PORTER,

Petitioners,

v.

ELIZABETH MARSHALL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the exception recognized by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), which permits the dismissal, based upon party affiliation, of an employee who holds a public office for which party affiliation is an appropriate requirement for effective performance, extends to the dismissal of a policy-making employee for speaking out on matters of public concern.

II.

Whether an employee who occupies a policy-making position may be dismissed for speaking out on matters of public concern which relate to the functioning of the office or the employer.

III.

Whether the application of the exception recognized by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), which permits the dismissal, based upon party affiliation, of an employee who holds a public office for which party affiliation is an appropriate requirement for effective performance, to the freedom of speech cases is limited to speech made in the context of the employee running for office or seeking to oust the employer from office.

LIST OF PARTIES

The parties to the proceeding below were the Petitioners, the Porter County Plan Commission and the County of Porter, Indiana, and the Respondent, Elizabeth Marshall. The individual members of the Plan Commission were parties in the trial court and judgment was entered in their favor, but the Respondent did not file a cross-appeal.

Rule 29.1 has no application either to the Petitioners or the Respondent.

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v.

ELIZABETH MARSHALL,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Porter County Plan Commission and the County of Porter, respectfully ask this Court to grant certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this civil proceeding on August 23, 1994.

OPINIONS BELOW

The opinion for the Court of Appeals for the Seventh Circuit is reported at 32 F.3d 1215 and is reprinted in the Appendix at p. 1. The September 30, 1994 order denying the Petition for Rehearing of the Petitioners is reprinted in the Appendix at p. 12.

The order entered by the magistrate judge on June 22, 1993, denying Petitioners' post-trial motion is unpublished and is reprinted in the Appendix at p. 16. The judgment order itself entered on August 25, 1992, is reprinted in the Appendix at p. 14.

The order entered by the magistrate judge on June 18, 1992, denying Petitioners' motion for summary judgment is unpublished and is reprinted in the Appendix at p. 26.

JURISDICTION

The action in the District Court proceeded under 42 U.S.C. § 1983 seeking to enforce rights secured by the First and Fourteenth Amendments. The District Court had jurisdiction under 28 U.S.C. § 1343. Pursuant to 28 U.S.C. § 636(c)(1), the Respondent consented in writing to transfer to a magistrate on July 11, 1991, and the Petitioners consented in writing on September 4, 1991. The Petitioners timely appealed the adverse judgment and denial of post-trial motions as of right to the Seventh Circuit pursuant to 28 U.S.C. § 1291.

The Seventh Circuit entered judgment on the appeal of the Petitioners on August 23, 1994. The Petitioners filed petitions for rehearing which were denied on September 30, 1994.

The Petitioners now invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), by filing this petition within the ninety day time period provided by 28 U.S.C. § 2101(c) and Rule 13.1 of this Court.

STATUTE INVOLVED

42 U.S.C. § 1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Marshall brought an action under 42 U.S.C. § 1983 against the Porter County Plan Commission, the County of Porter, and members of the Plan Commission seeking damages in the form of back pay and compensatory damages and reinstatement. She alleged that her employment as executive secretary for the Porter County Plan Commission was terminated in retaliation for exercising rights secured by the First Amendment. Specifically, she alleged that she was terminated for criticizing the performance of the building inspector, a fellow employee, at a private meeting attended by the building inspector, by the members of the Porter County Plan Commission, and by the members of the Porter County Board of Commissioners. She also contended that her employment was terminated for disclosing to an attorney for a landowner seeking a variance that two of the members of the Plan Commission had violated Indiana's Open-Door law by agreeing, in advance, to the disposition of the requested variance.

Marshall was the executive secretary for the Porter County Plan Commission, a patronage position and was first appointed by the Plan Commission in 1984 and then re-appointed annually. The Plan Commission holds hearings on rezoning, subdivisions or changes in land use and carries out the master plan. Although referred to as executive secretary, Marshall was, in reality, the administrator or director for the Plan Commission, reviewing subdivision plats, organizing the procedures for variances, rezonings and land use variances to process them for public hearing and performing all of the duties relating to planning and zoning in Porter County. As executive secretary, she was the one who interpreted the master plan, understood the technical aspects of the master plan, and set the agenda for the Plan Commission.

The building inspector was a patronage position appointed by and answerable to the County Board of Commissioners and was not under the direction or control of the Plan Commission or Marshall; however, the building inspector worked in the Plan Commission offices. His duties were to insure compliance with the building codes.

At a meeting of one of the committees of the Plan Commission, Marshall raised problems that she was having with the building inspector. Marshall had also previously advised one of the members of the County Board of Commissioners that she believed that the building inspector's mileage was excessive.

A meeting was held on December 11, 1990, to resolve differences that had arisen between Marshall and the building inspector. The relationship between the two had deteriorated to such an extent that the two seldom spoke to each other during the prior three months and the conflict was apparent to outsiders. The meeting was held in executive session and was attended by Marshall, the building inspec-

tor, the members of the Plan Commission, and the County Board of Commissioners. At that meeting, Marshall stated that the building inspector's mileage per inspection was approximately one-third higher than his predecessor, that the building inspector was not conducting the required inspections, and that the building inspector was engaging in political activity while on the job.

On January 9, 1991, Marshall was appointed for only a four-month term, as opposed to the one-year appointments which had always occurred in the past. Prior to that time, Marshall had never received any complaints from the members of the Plan Commission concerning her job performance.

A general contractor was building a home in the County in 1989, and after the home was completed, it was determined that one corner of the home encroached slightly into the front yard set-back. The contractor had applied for a variance before the County Board of Zoning Appeals, and that variance was denied in 1990 and as of January 9, 1991, the date of Marshall's limited reappointment, that matter was under administrative review before the State Circuit Court. Prior to the 1990 meeting on the requested variance of the Board of Zoning Appeals, a board appointed by the County Commissioners, Marshall had observed two of the Board members who were also members of the Plan Commission having a discussion about the case and one stated that they were "going to get this guy". In February, 1991, approximately one month after her limited appointment, Marshall contacted the contractor's attorney and advised him of what she had observed and supplied him with an affidavit which he then used in the pending administrative review claiming that the Board members had violated Indiana's Open-Door Act. Soon after Marshall signed the affidavit, the disclosure appeared in the newspaper.

On March 13, 1991, approximately one month after the disclosure appeared in the newspaper, Marshall's employment was terminated by a vote of the members of the Plan Commission. The various members of the Plan Commission cited several instances of what they believed to be poor job performance on the part of Marshall, but the sufficiency of these reasons to constitute cause for dismissal was disputed on the basis that the reasons were either insignificant, were not communicated to Marshall, or were not her fault.

The jury returned a verdict in favor of Marshall and against the Porter County Plan Commission and the County of Porter in the amount of $135,000.00 on which judgment was entered. The trial court denied reinstatement and entered an award of front pay in the amount of $26,500.00 and costs and fees in the approximate amount of $54,000.00.

The District Court had jurisdiction under 28 U.S.C. § 1343. Pursuant to 28 U.S.C. § 636(c)(1), the Petitioners and the Respondent consented in writing to transfer to the magistrate judge.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE INVOLVES THE IMPORTANT QUESTION NOT ANSWERED BY THIS COURT OF WHETHER THE EXCEPTION RECOGNIZED IN *ELROD v. BURNS*, 427 U.S. 347 (1976) AND *BRANTI v. FINKEL*, 445 U.S. 507 (1980), WHICH PERMITS THE TERMINATION OF EMPLOYEES BASED UPON POLITICAL PARTY AFFILIATION WHERE PARTY AFFILIATION IS AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF THE OFFICE, EXTENDS TO DISMISSALS FOR SPEAKING OUT ON MATTERS OF PUBLIC CONCERN, AN ISSUE OVER WHICH THE CIRCUITS ARE DIVIDED.

Drawing upon the plurality opinion as well as the concurring opinion of Justice Stewart in *Elrod v. Burns*, 427 U.S. 347 (1976), in *Branti v. Finkel*, 445 U.S. 507 (1980), the Court recognized that where "party affiliation is an appropriate requirement for the effective performance of the office involved" (*Id.* at 519), the employment of the office-holder may be terminated based upon political party affiliation. The Court then went on to hold that party affiliation was not an appropriate qualification for the office of assistant public defender because neither the policy-making aspect nor the confidentiality aspect of assistant public defender related to political beliefs. (*Id.* at 519-20).

Despite this Court's adoption of the "party affiliation requirement" test in *Branti* and the apparent departure from the use of the policy-maker exception initially recognized in *Elrod*, the Courts of Appeals still rely upon a policy-maker exception, referring to several of the indicia of a policy-maker set forth by Justice Brennan in *Elrod*. *See e.g. Matlock v. Barnes*, 932 F.2d 658 (7th Cir. 1991).

Based upon the duties of the office of executive secretary to the Plan Commission, it is clear that political party affiliation is an appropriate requirement for the effective per-

formance of executive secretary and that Marshall occupied a policy-making position. And in the Seventh Circuit, Marshall did not take issue with the assertion of the Plan Commission and the County that she occupied a policy-making position. Under *Branti*, had there been a change in political party, the employment of Marshall could have been terminated based upon political party affiliation. However, Marshall was not fired because of her political beliefs nor because of her political party affiliation, but rather because of her speaking out on matters of public concern relating to the County and to the members of the Plan Commission. It is the application of *Branti* to this scenario which has divided the circuits.

As noted in the opinion below, the Seventh Circuit regards political patronage cases as a "subset" of First Amendment discharge cases in general, recognizing that the *Branti* and the *Pickering v. Board of Ed. of Township High School District*, 391 U.S. 563 (1968) analyses can be combined. *Marshall v. Porter County Plan Commission*, 32 F.3d 1215, 1220-21 (7th Cir. 1994); *accord Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993); *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993). However, the Eleventh Circuit, in *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), refused to apply *Elrod* and *Branti* to cases involving political speech, opting for the open-ended, fact-sensitive inquiry of *Pickering*. (967 F.2d at 1527). *Elrod* and *Branti* are not so limited when their rationale is examined and must be extended to policy-making employees speaking out on matters of public concern, at least where the speech is related to the employer.

The standard adopted by the Court in *Branti* and the plurality opinion of Justice Brennan and the concurring opinion of Justice Stewart in *Elrod* was not new and was drawn from general First Amendment jurisprudence—the

"exacting scrutiny" and the "least restrictive means" standards. *Elrod v. Burns*, 427 U.S. 347, 362-64 (1976). Therefore, the wholesale incorporation of the *Elrod* and *Branti* analyses into general freedom of speech situations, as urged by the County, would not result in the application of any less exacting standard of scrutiny when examining cases involving speech on a matter of public concern.

One of the vital interests recognized as a justification for recognition of a policy-making exception for employment action is the need to insure political loyalty. *Elrod v. Burns*, 427 U.S. 347, 362-64 (1976). This loyalty concern, albeit personal as opposed to political, is implicated when a policy-maker speaks critically concerning her employer. The trust and confidence that the employer places in the policy-making employee is equally eroded whether the employee simply entertains political beliefs inconsistent with that of the employer or speaks critical of the employer.

Elrod and *Branti* recognize that policy-making or confidential employees may be discharged simply for subscribing to beliefs which may be contrary to or competing with those of the employer. The threat to the relationship between the employer and employee is sufficient to justify termination. When that threat manifests itself in the form of expression and then becomes apparent to the employer, the trust and confidence reposed in that employee is more undermined than when the beliefs remain dormant and an employee refrains from allowing those beliefs to interfere with her job duties. In short, if one can discharge a policy-maker for entertaining beliefs contrary to the interests of the employer, a policy-making employee may be discharged for the expression of those beliefs.

When one is dealing with a policy-maker or confidential employee, it should not be necessary to engage in the open-

ended inquiry of *Pickering* and balance the respective interests of the employer and employee. As observed by Judge Posner in *Wilbur v. Mahan*, 3 F.3d 214, 218 (7th Cir. 1993):

> "Legal proofs are not the only source of knowledge and decision. Categorical judgments based on experience and common sense play an important role in all areas of law. The exception recognized in the patronage cases for sensitive employees rests on such judgments and it retains its force in cases which have nothing directly to do with patronage or party affiliation."

The County does not suggest that a policy-making employee may be discharged for speaking out on all matters of public concern; however, where the matters relate to the employer, they are such that common sense dictates the employer-employee relationship will be impacted and the *Elrod* and *Branti* exceptions should apply.

II.

THE SEVENTH CIRCUIT'S LIMITATION OF *ELROD* AND *BRANTI* TO POLITICAL SPEECH IS INCONSISTENT WITH THESE TWO DECISIONS.

Although the Seventh Circuit recognized that *Elrod* and *Branti* extended to areas involving freedom of expression and speech on matters of public concern, the Court limited their application to situations in which the employee's "politics are implicated in the discharge". (32 F.3d at 1221). Since Marshall's speech was not made in an effort to obtain office or to oust another person from office, the Court of Appeals did not believe that the policy-maker exception applied. (*Id.*). This limitation is inconsistent with *Elrod* and *Branti*.

Throughout the *Branti* opinion, the Court makes reference to "private political beliefs". (445 U.S. at 517). The

exceptions come into play when one identifies the status of the employee as that of a policy-maker, and that the motivation for the discharge is the *political* beliefs of the employee. Using a typical definition of "political", political beliefs are those that relate to the government or the conduct of government. If a simple philosophical belief of a policy-maker on how government should be run is a sufficient justification for a vital governmental interest to come into play, the expression of that belief, without regard to whether it is made in the throes of an election or a debate is sufficient to call into play that same governmental interest. Comments made by a surgeon general concerning appropriate topics of education in schools impact the office of the president the same whether made in an election or non-election year, made in an effort to oust the president from office, or made simply to bring matters of concern to the attention of the public. One could not seriously question the discharge of the officeholder, regardless of the setting in which the comment is made.

To provide a constitutional basis for discharging a policy-maker, the statements need only relate to government or the conduct of government, as in the case at bar. The requirement of the Seventh Circuit that the statements be made in the context of seeking to have an officeholder removed from office fails to give full recognition to the legitimate governmental interest of having politically or personally loyal policy-makers assisting in the discharge of the public trust.

CONCLUSION

The Petitioners request that a writ of certiorari issue to the Court of Appeals for the Seventh Circuit and that this Court vacate the judgment entered in favor of the Respondent, directing that the court enter judgment in favor of the Petitioners.

Respectfully submitted,

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2794

ELIZABETH MARSHALL,

Plaintiff-Appellee,

v.

PORTER COUNTY PLAN COMMISSION, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. 91 C 149—**Andrew P. Rodovich,** ***Magistrate Judge.***

ARGUED FEBRUARY 8, 1994—DECIDED AUGUST 23, 1994

Before PELL, WOOD, JR., and ESCHBACH, *Circuit Judges.*

PELL, *Circuit Judge.* After Elizabeth Marshall was terminated from her position as the Executive Secretary for the Porter County Plan Commission, she filed a suit under 42 U.S.C. § 1983, in which she alleged that her discharge was in retaliation for exercising her First Amendment right to free speech. She also claimed that she was discharged in violation of the Fourteenth Amendment. The case proceeded to trial on her First Amendment claim, and the jury found for Marshall. The defendants appeal, claiming various trial errors and arguing that they did not violate Marshall's First Amendment rights.

I.

Elizabeth Marshall was appointed to the position of Executive Secretary of the Porter County Plan Commission in January 1984 and was reappointed annually until December 1991. The Plan Commission consisted of nine members, five of whom were appointed and four of whom were members by virtue of their holding other County offices. The Plan Commission holds hearings on rezoning, subdivisions, and changes in land use.

As the Executive Secretary, Marshall reviewed subdivision plats and organized procedures for variances, rezonings and use variances, in preparation for public hearings. In her capacity, she worked with the County Building Inspector, who was appointed by the Porter County Board of Commissioners. In January 1989, Ray Weltz was appointed as County Building Inspector, due in large part to the efforts of William Carmichael, who was a County Commissioner and a member of the Board. Shortly after Weltz' appointment, Marshall raised some questions about his performance, including excessive claims for mileage. Marshall also informed Carmichael and the Policy Committee of her concerns. No action was taken on the matters she raised.

Over the next few months the relationship between Weltz and Marshall deteriorated rapidly. At a meeting scheduled to address the conflict between Marshall and Weltz, on December 11, 1990, Marshall presented to the Plan Commission a list of concerns about Weltz, including his claims for excessive mileage, his involvement in partisan political activity in the office during county time, and his failure to make required building inspections. She also presented a list showing that one-half of the required inspections had not been performed. The Plan Commission took no action, and the situation remained the same. In early January of 1991, the Commission reappointed Marshall for a limited term of four months.

On January 24, 1991, Marshall met with Brian Hurley, attorney for the Plan Commission and the Board of Zoning

Appeals, and informed him that in mid-December members of the Board of Zoning Appeals had met secretly, prior to a public meeting, in violation of the Indiana open door law. Marshall had overheard a discussion between a few members of the Board concerning a variance that had been requested by developer William Putz. Marshall heard the members state that they were "going to get this guy." In response to Marshall's comments, Hurley indicated that he would not take action because the Board of Zoning Appeals had already prevailed in court and would prevail on appeal. In February, Marshall provided Putz' attorney with an affidavit that described the improprieties that she had observed. The newspapers reported the disclosure.

The Plan Commission met in late February to discuss Marshall's job performance. Marshall was not present. At an executive meeting in March 1991, with Marshall present, the members of the Plan Commission discussed their concerns with Marshall. Two days later, Marshall's employment was terminated, resulting from a vote of 7-2 by the Plan Commission. Those who voted against Marshall cited reasons ranging from the way she was doing her job to the handling of the Putz matter and the nature of her complaints concerning Weltz.

Marshall filed suit. The defendants filed a motion for summary judgment in which they argued that Marshall's complaints concerning Weltz were personal in nature and not protected, that because she was a policymaker, her speech was not protected by the First Amendment, that she failed to establish that she was discharged for her speech, that she was not entitled to a name-clearing hearing under the Fourteenth Amendment, and that the defendants were entitled to qualified immunity. The district court granted the motion as to the Fourteenth Amendment claim and as to any claims against the defendants in their individual capacities. The district court denied the motion in all other respects.

The case proceeded to trial before a magistrate judge, pursuant to 28 U.S.C. § 636(c). After the presentation of

evidence, the trial court instructed the jury that, as a matter of law, Marshall spoke on matters of public concern and left for the jury the question of whether she was discharged for that speech:

> A governmental employee, such as the plaintiff, has a right protected by the First Amendment to the U.S. Constitution to speak on matters of public concern relating to her agency or office. The court has determined that the plaintiff was speaking and raising questions about matters of public concern in her speech about Weltz' mileage reports, her allegations about his failure to conduct inspections, his political activities, and the Putz matter. Therefore, if Ms. Marshall shows that her speech was a substantial or motivating factor in the Plan Commission's decision to discharge her, then you must find in the plaintiff's favor unless the defendants prove by a preponderance of the evidence that she would have been discharged even absent her protected speech.

Court's Instr. 15. The jury found in favor of Marshall and awarded damages. The defendants subsequently filed a motion for a new trial or judgment notwithstanding the verdict, which the district court denied.

II.

The defendants argue that the district court improperly instructed the jury that Marshall's speech was of a matter of public concern. The defendants submit that Marshall's motive was essential to the determination of whether she was speaking out on a matter of public concern and that it was a disputed fact that should have been submitted to the jury through the defendants' tendered instruction concerning motive.

As recently reiterated by the United States Supreme Court, "[t]o be protected the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed

by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Waters v. Churchill*, 62 U.S.L.W. 4397, 4399 (1994), *quoting Connick v. Myers*, 461 U.S. 138, 142 (1983), *quoting Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968). The question presented by this appeal is whether Marshall's speech was a matter of public concern, as defined in *Pickering* and *Connick*. Whether the speech is a matter of public concern is a matter of law determined by the trial judge, which we review *de novo*. *Breuer v. Hart*, 909 F.2d 1035, 1039 (7th Cir. 1990); *see Connick*, 461 U.S. at 148 n.7.

We make that determination based on " 'the content, form, and context of a given statement as revealed by the whole record,' " *Smith v. Fruin*, No. 93-2839, slip op. at 9 (7th Cir. June 30, 1994) (quoting *Connick*, 461 U.S. at 147-48), but content is the most important factor. *Id.*; *Belk v. Town of Minocqua*, 858 F.2d 1258, 1264 (7th Cir. 1988) ("content is the greatest single factor in the *Connick* inquiry"); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984). Motive may play some part in determining whether the speech is of public concern because speech that promotes a purely private interest is not protected. But motive is not questioned in a vacuum. When we examine whether the content, form and context indicate that motive is personal, *see Callaway v. Hafeman*, 832 F.2d 414 (7th Cir. 1987), we also examine the speech itself. If the speech concerns a subject of public interest but the *expression* addresses only the personal effect upon the employee, then as a matter of law the speech is not of public concern. *See Smith*, No. 93-2839, slip op. at 10. Motive may be relevant, but it is not dispositive. *Glass v. Dachel*, 2 F.3d 733, 741 (7th Cir. 1993); *Belk*, 858 F.2d at 1264. It is often the case that those who speak out are also involved in personal disputes with employers and other employees. *See, e.g., Breuer*, 909 F.2d at 1039 ("Wrongdoing may often be revealed to the proper authorities only by those who have some personal stake in exposing wrong-

doing."); *Belk*, 858 F.2d at 1264. A personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern. *Breuer*, 909 F.2d at 1039 ("fact that these serious allegations arose in the context of what began as a personal dispute does not in itself disqualify from protection all speech on the topics arising from that dispute"). In fact, we have observed that a plaintiff's speech could be characterized as a matter of public concern even if the speaker stands to gain a personal benefit in addition to bringing the wrongdoing to light. *Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir. 1990) (*en banc*) ("Even if the plaintiffs themselves viewed their problems as only a personal matter, the test of public concern is more objective."), *cert. denied*, 501 U.S. 1204 (1991).

Although relations became strained during the year that Marshall observed Weltz' activities, her charges that Weltz made claims for excessive mileage reimbursements, failed to make required inspections, and engaged in partisan politics on County time, were communicated as office concerns, not as concerns that affected only Marshall. Weltz' activities were the type that result in the misuse of public funds and trust. These were not employment disputes or criticisms of the way that only Marshall's job was affected. Marshall documented the misuses of office that she witnessed and formally brought them to the attention of Plan Commission members. Marshall also brought to light possible violations of the Indiana open door law, a matter entirely of public interest, by informing first the county attorney and then, when no action was taken, Putz' attorney. The district court properly found that as a matter of law Marshall was speaking out on matters of public concern.

In a related claim the defendants also argue that their proposed Instruction 14,[1] which concerns motive, should

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[1] Defendants' Instruction 14 stated:

> In determining whether the statements made by the Plaintiff which are at issue in this case are protected by the First

(Footnote continued on following page)

have been submitted to the jury. Because Marshall's speech was of a matter of public concern, the court properly refused to submit the instruction. Once the court determined that Marshall was speaking out on matters of public concern, the jury was to determine the defendants' motivation in terminating Marshall's employment. The defendants' proposed instruction on motive did not accurately state the law in that it indicated that motive was the dispositive factor in determining whether Marshall's speech was protected. Even if the defendants were entitled to an instruction regarding motive, they were required to tender an instruction that correctly stated the law in order to challenge the district court's refusal to use it. *Northbrook Excess & Surplus v. Procter & Gamble*, 924 F.2d 633, 638 (7th Cir. 1991).

III.

The defendants launch a general objection to the analysis used by the trial court and argue that as a matter of law Marshall could have been fired for speaking out even on matters of public concern because she was a policymaker/confidential employee. The precise claim that the defendants are making is not clear. To the extent that they are resuming their argument in their motion for summary judgment, we cannot review the claim because a full jury trial took place. *Watson v. Amedco Steel, Inc.*,

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[1] *continued*

Amendment, you must take into consideration the motive of the Plaintiff in making the statements or, in other words, the point of the speech in question. If it was the motive of the Plaintiff or the point of the speech to bring wrongdoing to light or to raise other issues of public concern, because they are of public concern, her speech is protected by the First Amendment. However, if her motive or the point of the speech was to further some purely private interest, such as to retaliate against the Defendants or embarrass the Defendants because of the actions that they took, her statements are not protected by the First Amendment.

No. 92-3947, slip op. (7th Cir. July 11, 1994) (appellant cannot challenge the denial of summary judgment after a full trial on the merits). But because Marshall responds to the defendants' argument in the same general manner, we will consider the argument.

In essence, the defendants challenge the law as applied through the jury instructions. The statement of law found in Instruction 15, which instructed the jury to find in Marshall's favor if she was terminated for her speech on particular matters, is, in effect, the law after application of the balancing test in *Pickering* and *Connick*. The defendants contend that rather than approaching this case with a *Pickering/Connick* analysis the court should have analyzed it under the line of cases derived from *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). Labeled as "political patronage cases," these cases provide that policymakers and confidential employees may be discharged due to their political beliefs. The circuits disagree about the relationship between the *Pickering/Connick* cases and the *Elrod/Branti* cases. Although some circuits discuss these cases as being wholly distinct, *see, e.g., Stough v. Gallagher*, 967 F.2d 1523, 1527-28 (11th Cir. 1992), we regard the political patronage cases as a subset of cases concerning discharge in retaliation for the exercise of First Amendment rights. *Heideman v. Wirsing*, 7 F.3d 659, 662 (7th Cir. 1993); *Wilbur v. Mahan*, 3 F.3d 214, 219 (7th Cir. 1993) (disagreeing with the determination by the Eleventh Circuit that the *Elrod* and *Pickering* lines of cases cannot be combined). But the relationship between the two types of cases is not implicated by this case. The difficult cases are those in which an employee's speech reflects his or her political associations, for instance when an employee campaigns against or openly supports a political candidate whose beliefs are adverse to the employee's superior. Marshall was not running for office, and she was not seeking to displace her employer with someone of her political beliefs. The evidence did not suggest that Marshall's termination resulted from partisan politics.

The defendants argue that because Marshall was a confidential employee that the *Elrod/Branti* analysis applies and that Marshall could have been fired for her speech. But whether one is a policymaker is not the determinative question in this case. We recently rejected the defendants' position in *Wilbur* in which we stated that "the patronage cases do not . . . hold that an individual surrenders *all* his freedom of speech by becoming a confidential or policymaking employee of government." 3 F.3d at 217. We noted that it was "too big a leap" for the district court to infer that "once a public employee is put into the confidential-assistant or policymaker slot, he loses his right of free speech." *Id.* Our cases do not restrict the rights of policymakers to such an extent that they have no First Amendment rights, regardless of the content of their speech. *Id.* The *Branti/Elrod* cases apply when the plaintiff's politics are implicated in the discharge; then the court asks whether the plaintiff is in a policymaking or confidential position. Marshall spoke about Weltz' excessive mileage and failure to conduct inspections. In doing so she was not aspiring towards his position, nor was she attempting to oust one who belonged to a different party or party faction. The defendants do not argue that Marshall's discharge resulted from her political associations; nor do they argue that she supported the wrong candidate for office. Because Marshall's alleged position as a policymaker or confidential employee does not prompt the application of *Elrod* and *Branti*, the district court was correct in applying the balancing test advanced in *Pickering* and *Connick* before submitting the case to the jury.

IV.

The defendants argue that remarks regarding Carmichael's participation in the events leading up to Marshall's dismissal that were made by Marshall's counsel during closing argument were improper and constituted reversible error. The defendants believe that counsel argued a theory of "conspiracy" when the evidence did not support such

an assertion. We give considerable deference to the district court to supervise the arguments of counsel, and it is rare that improper comments made during closing argument rise to the level of reversible error. *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246, 1250-51 (7th Cir. 1992). Reversal is warranted only if the remarks depart from the evidence presented and " 'influenced the jury in such a way that substantial prejudice resulted to' the opposing party." *Arcor, Inc. v. Textron, Inc.*, 960 F.2d 710, 713 (7th Cir. 1992) (quoting *Fenolio v. Smith*, 802 F.2d 256, 258 (7th Cir. 1986)); *see Slane v. Jerry Scott Drilling Co., Inc.*, 918 F.2d 123, 128 (10th Cir. 1990) (court will not reverse on an improper closing argument unless it obviously prejudiced one of the parties); *Gossett v. Weyerhaeuser Co.*, 856 F.2d 1154 (8th Cir. 1988).

Our review of the record reveals that Marshall's counsel did not argue that Carmichael was involved in a conspiracy. No conspiracy instruction was given to the jury. The comments concerning Carmichael were all with respect to evidence elicited during the trial. Weltz and other members of the Plan Commission were appointed by Carmichael, and Carmichael attended the meeting of December 1990. Counsel argued that Carmichael supported his appointees, which was supported by the record. She made no mention of a conspiracy. The defendants' counsel, on the other hand, repeatedly argued that the jury would have to find a "broad-based conspiracy" Tr. at 552, 554-56, 567, 577. The court instructed the jury to find whether Marshall was discharged for her speech regarding the activities of Weltz and the Putz matter. As the defendants state in their brief, "Carmichael's role was critical to the Plaintiff establishing motivation on the part of the members of the Plan Commission to act in retaliation for the Plaintiff's criticism of Weltz." Far from constituting reversible error, the comments made by counsel were warranted by the evidence that was presented during the trial.

V.

Accordingly, for the reasons stated herein, the jury verdict for the plaintiff Elizabeth Marshall is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 30, 1994

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge

ELIZABETH MARSHALL,
Plaintiff-Appellee,

No. 93-2794 *v.*

PORTER COUNTY PLAN COMMISSION,
et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 91 C 149—Andrew P. Rodovich, *Magistrate Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendants-Appellants, all of the judges on the original panel having voted to deny a rehearing and no judge in regular active service having requested a vote on the suggestion for rehearing *en banc.*

IT IS HEREBY ORDERED that the aforesaid petition for rehearing, and suggestion that it be reheard *en banc* be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 23, 1994

BEFORE:

Honorable WILBUR F. PELL, JR., Circuit Judge
Honorable HARLINGTON WOOD, JR., Circuit Judge
Honorable JESSE E. ESCHBACH, Circuit Judge

No. 93-2794

ELIZABETH MARSHALL,

Plaintiff-Appellee

v.

PORTER COUNTY PLAN COMMISSION,
PORTER COUNTY, DONALD BENGEL, et al.,

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division
No. 91 C 149, Andrew P. Rodovich, Magistrate Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

[Filed August 25, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JUDGMENT IN A CIVIL CASE

ELIZABETH MARSHALL

v.

PORTER COUNTY PLAN COMMISSION, et al

CASE NUMBER: H91-149

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, ELIZABETH MARSHALL, and against the defendants, THE COUNTY OF PORTER and THE PORTER COUNTY PLAN COMMISSION, and assess damages in the amount of $135,000.00.

IT IS ORDERED AND ADJUDGED that plaintiff's Request for Reinstatement is DENIED. Plaintiff is awarded front pay in the amount of $26,500.00 in lieu of reinstatement. Plaintiff's Motion for Attorney Fees and Costs is GRANTED. Judgment is entered in favor of the plaintiff and against the defendants for attorney

fees in the amount of $51,998.00 and costs in the amount of $1,796.00.

(Current interest rate is 3.41%)

On June 18, 1992, the Court Granted defendants' Motion for Summary Judgment as to the claims based upon the due process clause of the Fourteenth Amendment and as to any claims against them in their individual capacities.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

August 25, 1992
Date

/s/ Geraldine J. Crockett
Clerk

/s/ Joan R. Holderman
(By) Deputy Clerk

[Filed June 22, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

ELIZABETH MARSHALL	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. H 91-149
	)	
PORTER COUNTY PLAN COMMISSION, PORTER COUNTY, DONALD BENGEL, RICHARD BURNS, ROBERT DETERT, JAMES ERIKSSON, JAMES FIKE, RUTH ANN McWHORTER, and JANE PECOR, Individually and in their capacity as Plan Commission Members,	)	
	)	
Defendants	)	

ORDER

This matter is before the court on the Post-Trial Motion filed by the defendants, Porter County Plan Commission, Porter County, Donald Bengel, Richard Burns, Robert Detert, James Eriksson, James Fike, Ruth Ann McWhorter, and Jane Pecor, on September 8, 1992. For the reasons set forth below, the motion is DENIED.

Background

The plaintiff, Elizabeth Marshall, filed this action on May 6, 1991, contending that the defendants, the Porter Coun-

ty Plan Commission, Porter County, and members of the Plan Commission terminated her position as Executive Secretary of the Plan Commission in violation of her First Amendment right of free speech. On July 2, 1992, after a four day trial, a jury awarded Marshall $135,000.00 in damages.

On September 8, 1992, the defendants filed a motion for a new trial or a judgment notwithstanding the verdict contending that the evidence presented at trial did not support the jury's verdict. In addition, the defendants contend that this court erred in admitting Exhibits 2 and 7 and in allowing Marshall to argue a conspiracy theory. The defendants further contend that this court erred in its June 18, 1992 Order denying their Motion for Summary Judgment on three different issues. Finally, the defendants argue that this court erred in failing to submit three instructions to the jury.

Discussion

Judgment Notwithstanding the Verdict or New Trial

A motion for judgment notwithstanding the verdict is governed by Federal Rule of Civil Procedure 50(b) which provides in pertinent part:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; . . . If a verdict was returned the court may

> allow the judgment to stand or may re-open the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . .

In *Garret v. Barnes*, 961 F.2d 629 (7th Cir. 1992), the Seventh Circuit stated:

> A judgment n.o.v. should be denied " 'where the evidence, along with the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions.' "
>
> 961 F.2d at 631 (*quoting McClure v. Cywinski*, 686 F.2d 541, 544 (7th Cir. 1982))

In deciding a motion for a judgment notwithstanding the verdict or for a new trial, the court must determine "whether the party with the burden of proof has produced sufficient evidence upon which a jury could properly proceed to a verdict and . . . a mere scintilla of evidence will not suffice." *Richardson v. Indianapolis*, 658 F.2d 494, 498 (7th Cir. 1981). *See Garret*, 961 F.2d at 631; and *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 898 F.2d 512, 515 (7th Cir. 1990).

A motion for a new trial is governed by Federal Rule of Civil Procedure 59(a) which provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury for any of the reasons at law in the courts of the United States; . . .

A new trial should be granted only when the verdict is against the clear weight of the evidence. *Blumenfeld v. Stuppi*, 921 F.2d 116, 118 (7th Cir. 1991); *Pincus v. Pabst Brewing Company*, 893 F.2d 1544, 1549 (7th Cir. 1990);

Davlin v. Otis Elevator Company, 816 F.2d 287, 289 (7th Cir. 1987); and *Babb v. Minder*, 806 F.2d 749, 752 (7th Cir. 1986). "[A] motion for a new trial is addressed to the sound discretion of the trial judge and will be reviewed only for an abuse of discretion." *Robinson v. Lescrenier*, 721 F.2d 1101, 1104 (7th Cir. 1983).

In the instant case, the defendants contend that Marshall did not present enough evidence to support the jury's verdict that she was terminated on the basis of her speech. The evidence introduced at trial is as follows.

The plaintiff, Elizabeth Marshall, was first appointed as Executive Secretary for the Porter County Plan Commission in January, 1984, and was reappointed annually through December, 1990. In 1989, Ray Weltz was appointed as a Building Inspector by the Porter County Board of Commissioners. Shortly after Weltz's appointment, Marshall complained to various members of the Plan Commission about Weltz's job performance including his failure to conduct inspections, his failure to complete the necessary paperwork, and his excessive mileage reports. Marshall also complained to a County Commissioner, William Carmichael, about Weltz's excessive mileage reports in 1989. Although Carmichael conducted an investigation, no action was taken against Weltz. Marshall and Weltz continued to have personality conflicts, and in December, 1990, the Plan Commission met with both Weltz and Marshall to resolve their differences. However, the situation did not change. On January 9, 1991, the Plan Commission decided to reappoint Marshall for only a four month term, but it did not give her any explanation for the limited reappointment. Marshall's job performance had never been criticized prior to that time.

On January 24, 1991, Marshall met with the county attorney, Brian Hurley, to report allegations that members

of the Board of Zoning Appeals had acted inappropriately while contemplating a zoning appeal which had been filed by a developer, William Putz. Marshall claimed that she overheard two members of the Zoning Board discussing the Putz matter and that she heard one member say that he was out to "get that guy." Attorney Hurley did not take any action. On February 13, 1991, Marshall met with Putz's attorney, Gerald Bishop, and signed an affidavit which detailed allegations of the inappropriate actions taken by the Zoning Board members in the Putz matter.

On February 27, 1991, the Plan Commission met in an executive session to discuss their concerns about Marshall's job performance. Marshall was not present at the meeting. On March 11, 1991, the Plan Commission again met in an executive session, with Marshall present, and informed her of their concerns with her job performance. Subsequently, on March 13, 1991, the Plan Commission terminated Marshall's appointment.

In viewing the evidence in the light most favorable to the plaintiff, there was substantial evidence presented at trial for a reasonable jury to conclude that Marshall was discharged in violation of her First Amendment right of free speech. Therefore, the Motion for Judgment Notwithstanding the Verdict or a New Trial must be denied.

Admission of Exhibits and Conspiracy Argument

The defendants contend that this court erred in admitting Exhibit 7, a report prepared by the I.D.E.T.S. stating that Marshall was not discharged for cause. Exhibit 7 was allowed into evidence under Federal Rule of Evidence 803 (8)(C), the public records exception to the hearsay rule. In *Pollard v. Rea Magnet Wire Company, Incorporated*, 674 F.Supp. 645 (N.D. Ind. 1986), the court stated:

> Generally, the admission of administrative agency findings rests within the sound discretion of the trial judge. (citation omitted) If the document is trustworthy within the meaning of Fed. R. of Evid. 803 (8)(C), does not impair the judge's duty to try the case *de novo*, and is more useful than prejudicial, then it may be admitted.
>
> 674 F.Supp. at 653

In *Pollard*, the court allowed the admission of the I.D.E.T.S. report since it was relevant and not prejudicial. In the instant case, the report was trustworthy and relevant even though it was prepared by a hearing officer and not the full agency. In addition, the defendants have failed to establish that the report was prejudicial. Therefore, the admission of the exhibit under Rule 803(8)(C) does not constitute reversible error.

In addition, the defendants contend that this court erred by admitting Exhibits 1 and 2 which concerned Weltz's performance as a building inspector. The defendants contend that since Weltz's performance was not an issue in the case, the evidence was prejudicial under Rule 403. However, before evidence can be excluded under Rule 403, the probative value of the evidence must be substantially outweighed by the prejudicial effect. *See Sims v. Mulcahy*, 902 F.2d 524, 531 (7th Cir. 1990); *United States v. Krenzelok*, 874 F.2d 480, 482 (7th Cir. 1989); and *Campbell v. Greer*, 831 F.2d 700, 705 (7th Cir. 1987).

Evidence concerning Weltz's job performance was relevant to the issues at trial. Marshall was making serious allegations against Weltz, and the truth of the allegations was important in assessing the Commission's response to those charges. If the charges had been false or concerning trivial matters, the groundless allegations may have been a motive for discharging Marshall. Finally, the defendants have failed to demonstrate how the exhibits were

prejudicial or how any prejudice outweighed their probative value.

Finally, the defendants contend that this court committed reversible error by allowing Marshall to argue that Commissioner William Carmichael was involved in the termination of Marshall. Contrary to the defendants' assertions, this case was not submitted to the jury on a conspiracy theory. No jury instructions were given on a conspiracy, and the plaintiff only argued that Carmichael's involvement provided a motive for the plaintiff's termination. Evidence was presented that several Commission members, as well as Weltz, were appointed by Carmichael. In addition, evidence was presented that Carmichael attended the December, 1990 meeting where Weltz and Marshall attempted to discuss their differences. There was sufficient evidence presented at trial for a jury to determine that Carmichael's involvement may have persuaded the Commission members to terminate Marshall. The plaintiff was entitled to argue, and the jury was entitled to find, that Carmichael and the Commission members he appointed did not like the fact that the plaintiff was criticizing Weltz, another political ally of Carmichael.

Summary Judgment Issues

The defendants contend that this court erred in its June 18, 1992 Order denying their March 9, 1992 Motion for Summary Judgment. However, the defendants have not presented any evidence or arguments requiring a reconsideration of the June 18 Order. *See Woods v. City of Michigan City, Indiana*, 940 F.2d 275, 280 (7th Cir. 1991); *DeBruyne v. Equitable Life Assurance Society of the United States*, 920 F.2d 457, 471 (7th Cir. 1990); and *Manor Healthcare Corporation v. Guzzo*, 894 F.2d 919, 922 n.4 (7th Cir. 1990).

The defendants have cited *Churchill v. Waters*, 977 F.2d 1114 (7th Cir. 1992), for the proposition that the court should not have ruled that the speech at issue was constitutionally protected. However, in *Churchill*, the content of the plaintiff's speech was disputed. Although the plaintiff contended that she was discussing the merits of the nursing policies, other persons stated that the plaintiff was complaining about the department and the hospital administrators. *See Churchill*, 977 F.2d at 1118. The Seventh Circuit stated:

> While we review the entire record in order to determine whether Churchill's speech is a matter of public concern, . . . we may not consider disputed issues of fact in order to come to a conclusion in our review of the district court's grant of summary judgment. . . . The *status* of Churchill's speech is a question of law, . . . but in this case, where the *content* of the speech is in dispute, the substance of the speech is a question of fact for the jury to resolve. (emphasis in original)
>
> 977 F.2d at 1120-21

In the instant case, the parties do not dispute the content of Marshall's speech. However, the defendants contend that Marshall's motivation behind the speech was an issue which should have been submitted to the jury. In the June 18 Order, this court determined that the motivation behind Marshall's speech, although relevant, was not dispositive. Since the content of Marshall's speech was undisputed, the determination of whether her speech was constitutionally protected was a question of law properly decided by this court. *See* June 18, 1992 Order at pp. 5-11. *See also Breuer v. Hart*, 909 F.2d 1035, 1038-39 (7th Cir. 1990).

Under our system of justice, there is a strong preference for deciding cases on their merits. Equally impor-

tant, however, is the principle of finality. Judges should be asked to reconsider their decisions only under rare circumstances. Since the June 18 Order was entered after the parties were afforded ample opportunity to address all of the issues, that Order should not be disturbed absent compelling circumstances. The motion for summary judgment cannot be considered *de novo* at this late date. Therefore, the June 18 Order will stand.

Jury Instructions

In determining whether the jury was instructed properly, the jury instructions must be viewed in their entirety and not on the basis of "one single paragraph, sentence, phrase or word." *United States v. Davenport*, 824 F.2d 1511, 1517 (7th Cir. 1987) *quoting United States v. Lang*, 644 F.2d 1232, 1240 (7th Cir. 1981). A jury has been instructed properly if viewing all of the instructions in a common-sense manner the instructions fairly and accurately summarize the applicable law and do not mislead the jury. *United States v. Olson*, 825 F.2d 121, 123 (7th Cir. 1987); *United States v. Grier*, 823 F.2d 177, 178 (7th Cir. 1987); and *Davis v. Lane*, 814 F.2d 397, 401 (7th Cir. 1987). A jury verdict should not be set aside, especially after a lengthy trial, unless "the jury's understanding of the issue was seriously affected" by an erroneous instruction. *Sherrod v. Berry*, 827 F.2d 195, 203 (7th Cir. 1987) *quoting Wilk v. American Medical Association*, 719 F.2d 207, 219 (7th Cir. 1983).

The defendants contend that this court erred by failing to submit Defendants' Instruction 13 to the jury. In addition, the defendants contend that this court erred by submitting Court's Instruction 19 and the second paragraph of Court's Instruction 17 to the jury. In *Heller In-*

ternational Corporation v. Sharp, 974 F.2d 850 (7th Cir. 1992), the Seventh Circuit stated:

> An error in giving (or refusing to give) a particular instruction will not be considered reversible error unless, considering all the instructions, the evidence and the arguments that the jury heard, it appears that the jury was misled or did not have a sufficient understanding of the issues and its duty to determine them.
>
> 974 F.2d at 856 (*quoting Simmons, Incorporated v. Pinkerton's, Incorporated*, 762 F.2d 591, 597 (7th Cir. 1985))

See also Roggow v. Mineral Processing Corporation, 894 F.2d 246, 248 (7th Cir. 1990); and *Wilk*, 719 F.2d at 218-19.

In the instant case, after considering all of the instructions, the evidence and the final arguments, the defendants clearly had the opportunity to present their theory of the case, and the jury had a sufficient understanding of the issues. The failure to give Defendants' Instruction 13 does not constitute reversible error. In addition, the Court's Instructions 19 and 17 contain the applicable law, and the fact that the jury was given those instructions does not constitute reversible error.

For the reasons set forth above, the Post-trial Motion filed by the defendants, Porter County Plan Commission, Porter County, Donald Bengel, Richard Burns, Robert Detert, James Eriksson, James Fike, Ruth Ann McWhorter, and Jane Pecor, on September 8, 1992, is DENIED.

ENTERED this 22 day of June, 1993

/s/ Andrew P. Rodovich
United States Magistrate Judge

[Entered June 18, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

ELIZABETH MARSHALL	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO. H 91-149
	)	
PORTER COUNTY PLAN COMMISSION, PORTER COUNTY, DONALD BENGEL, RICHARD BURNS, ROBERT DETERT, JAMES ERIKSSON, JAMES FIKE, RUTH ANN McWHORTER, and JANE PECOR, Individually and in their capacity as Plan Commission Members,	)	
	)	
Defendants	)	

ORDER

This matter is before the court on the Motion for Summary Judgment filed by the defendants, Porter County Plan Commission, Porter County, Donald Bengel, Richard Burns, Robert Detert, James Eriksson, James Fike, Ruth Ann McWhorter, and Jane Pecor, on March 9, 1992. For the reasons set forth below, the motion is GRANTED IN PART.

Background

The plaintiff, Elizabeth Marshall, was first appointed as Executive Secretary for the Porter County Plan Commission in January, 1984, and was reappointed annually through December, 1990. In 1989, Ray Weltz was appointed as a Building Inspector by the Porter County Board of Commissioners. Shortly after Weltz' appointment, Marshall complained to various members of the Plan Commission about Weltz' job performance including his failure to conduct inspections, his failure to complete the necessary paperwork, and his excessive mileage reports. Marshall also complained to a County Commissioner, William Carmichael, about Weltz' excessive mileage reports in 1989. Although Carmichael conducted an investigation, no action was taken against Weltz. Marshall and Weltz continued to have personality conflicts, and in December, 1990, the Plan Commission met with both Weltz and Marshall to resolve their differences. However, the situation did not change. On January 9, 1991, the Plan Commission decided to reappoint Marshall for only a four month term, but it did not give her any explanation for the limited reappointment. Marshall's job performance had never been criticized prior to that time.

On January 24, 1991, Marshall met with the county attorney, Brian Hurley, to report allegations that members of the Board of Zoning Appeals had acted inappropriately while contemplating a zoning appeal which had been filed by a developer, William Putz. Marshall claimed that she overheard two members of the Zoning Board discussing the Putz matter and that she heard one member say that he was out to "get that guy." Attorney Hurley did not take any action. On February 13, 1991, Marshall met with Putz' attorney, Gerald Bishop, and signed an affidavit

which detailed allegations of the inappropriate actions taken by the Zoning Board members in the Putz matter.

On February 27, 1991, the Plan Commission met in an executive session to discuss their concerns about Marshall's job performance. Marshall was not present at the meeting. On March 11, 1991, the Plan Commission again met in an executive session, with Marshall present, and informed her of their concerns with her job performance. Subsequently, on March 13, 1991, the Plan Commission terminated Marshall's appointment.

Marshall filed this action on May 6, 1991, contending that her limited reappointment and subsequent termination of her appointment were due to her complaints about Weltz' job performance and her report of misconduct by the Zoning Board members in the Putz matter. Therefore, Marshall claimed that her termination was a violation of her First Amendment right of free speech. Marshall also claimed that she was not informed of the reasons behind her limited reappointment and later termination until the March 11, 1991 meeting and that she was not given a name-clearing hearing as required by the Fourteenth Amendment.

On March 9, 1992, the defendants, the Porter County Plan Commission, Porter County, Donald Bengel, Richard Burns, Robert Detert, James Eriksson, James Fike, Ruth Ann McWhorter, and Jane Pecor, filed their Motion for Summary Judgment contending that Marshall's speech was not constitutionally protected; that Marshall has failed to present sufficient evidence to establish that she was discharged because of her speech; that Marshall held a policymaking position and was not entitled to First Amendment protection; that Marshall was not sufficiently stigmatized to require a name-clearing hearing; and that the defendants are entitled to qualified immunity.

Discussion

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only if it is demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990); *McGraw-Edison v. Walt Disney Products*, 787 F.2d 1163, 1167 (7th Cir. 1986); *Ross v. Franzen*, 777 F.2d 1216, 1220 (7th Cir. 1985); and *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984). The burden is upon the moving party to establish that no material facts are in genuine dispute, and any doubt as to the existence of a genuine issue must be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, 90 S.Ct. 1598, 1610, 26 L.Ed.2d 142, 155 (1970); *Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1195 (7th Cir. 1990); and *Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985). A fact is material if it is outcome determinative under applicable law. *Doe v. Small*, 934 F.2d 743, 752 (7th Cir. 1991); *Whetstine v. The Gates Rubber Company*, 895 F.2d 388, 392 (7th Cir. 1990); and *Big O Tire Dealers, Inc.*, 741 F.2d at 163. Even if the facts are not in dispute, summary judgment is inappropriate when the information before the court reveals a good faith dispute as to inferences to be drawn from those facts. *Powers v. Dole*, 782 F.2d 689, 694 (7th Cir. 1986); *Munson*, 754 F.2d at 690; and *Burns v. Rockford Life Insurance Company*, 740 F.2d 542, 546 (7th Cir. 1984). Finally, summary judgment generally is not an appropriate means of resolving questions of motive and intent. *United Association of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1268 (7th Cir. 1990); *Bartman v. Allis-Chalmers Corporation*, 799 F.2d 311, 312 (7th Cir. 1986); and *Munson*, 754 F.2d at 690.

In deciding a motion for summary judgment, the trial court must determine whether the evidence presented by the party opposed to the summary judgment is such that a reasonable jury might find in favor of that party after a trial.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.
>
> [T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.
>
> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)

See also: *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 273 (1986); *County of Vernon v. United States*, 933 F.2d 532, 534 (7th Cir. 1991); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 660 (7th Cir. 1991); and *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990).

First Amendment Freedom of Speech

Government employees do not relinquish their First Amendment freedom of speech as a condition of employment. *Connick v. Myers*, 461 U.S. 138, 140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983); and *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 232 (1968). Therefore, when an employee claims that she was terminated in violation of her First Amendment right of free speech, the first inquiry is whether

the employee's statements involved matters of public concern. *Connick*, 461 U.S. at 146-47, 103 S.Ct. at 1689-90; *Pickering*, 391 U.S. at 574, 88 S.Ct. at 1734, 1737; *Griffin v. Thomas*, 929 F.2d 1210, 1214 (7th Cir. 1991); *Breuer v. Hart*, 909 F.2d 1035, 1037 (7th Cir. 1990); and *Domiano v. Village of River Grove*, 904 F.2d 1142, 1145 (7th Cir. 1990).

Although based on potential factual disputes, the determination of whether an employee's speech was a matter of public concern is a matter of law to be determined by the court. *Breuer*, 909 F.2d at 1037. The court must examine the record as a whole for the content, form, and context of the speech. Content is the most important of these factors. *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690-91; and *Breuer*, 909 F.2d at 1037. If the speech is protected based on the content, form and context, the court must weigh the "public employer's burden in attempting to justify the discharge of an employee for activities and statements involving matters of public concern" against the employee's First Amendment rights. *Breuer*, 909 F.2d at 1039. Therefore, each element of content, form and context will be addressed to determine whether Marshall's speech was protected by the First Amendment.

1. Content

To determine if the employee's speech was a matter of public concern, the court first must address its content. Speech concerning an alleged activity by government officials which, if proven, would constitute "wrongdoing or breach of public trust," is clearly a matter of public concern. *Connick*, 461 U.S. at 148, 103 S.Ct. at 1690; and *Breuer*, 909 F.2d at 1038. As long as the speech as a

whole relates to matters of public concern, it does not become unprotected if it also contains personal complaints. *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691; *Barkoo v. Melby*, 901 F.2d 613, 618 (7th Cir. 1990); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1301 (7th Cir. 1990); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1263 (7th Cir. 1988); and *Berg v. Hunter*, 854 F.2d 238, 242-43 (7th Cir. 1988).

In the instant case, Marshall contends that her limited reappointment was a result of her complaints about Weltz. Marshall stated in her deposition that she complained to County Commissioner Carmichael in 1989 about Weltz' mileage. (Deposition of Elizabeth Marshall, p. 99) Larry Sheets, a member of the Plan Commission, stated in his deposition that Marshall complained to him about Weltz' job performance prior to December, 1990. (Deposition of Larry Sheets, pp. 8, 12) James Brown, another member of the Plan Commission, stated in his deposition that Marshall complained to him about Weltz' job performance. (Deposition of James Brown, p. 7) Robert Detert, another member of the Plan Commission, also stated in his deposition that Marshall complained to him about Weltz. (Deposition of Robert Detert, p. 20) Ruth Ann McWhorter, another member of the Plan Commission, stated in her deposition that Marshall had told her that various builders were complaining about Weltz' job performance. (Deposition of Ruth Ann McWhorter, p. 60)

Marshall also contends that her termination was a direct result of her allegations against the Zoning Board. Marshall stated in her deposition that she overheard two members discussing the zoning appeal of a developer, William Putz; that she informed the county attorney that she had witnessed a violation of the Open Door Law by members of the Zoning Board; and that since the county attorney refused to take any action, she informed Putz'

attorney, Gerald Bishop, of the allegations against the Zoning Board. (Deposition of Elizabeth Marshall, pp. 8, 10-11, 17-19)

Marshall further stated that her actions in the Putz matter were criticized by Plan Commission members at the March 11, 1991 executive meeting. (Deposition of Elizabeth Marshall, p. 32) Donald Bengel, a member of the Plan Commission, stated in his deposition that he felt that Marshall's actions in the Putz matter factored into her termination. (Deposition of Donald Bengel, p. 30, 44) Larry Sheets stated in his deposition that Commission members had made comments at the March 11, 1991 meeting that Marshall's actions in the Putz matter "sealed it against her getting the job." (Deposition of Larry Sheets, p. 33)

In the instant case, Marshall's allegations of misconduct by Weltz and by two members of the Zoning Board were clearly matters of public concern. The allegations made by Marshall raised more than an intradepartmental dispute or an employment decision and would constitute "wrongdoing or a breach of public trust." *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690; and *Breuer*, 909 F.2d at 1038. Therefore, the context and form of the speech also must be examined.

2. Form

It is clear in the record that Marshall complained to various Plan Commission members about Weltz' performance prior to her limited reappointment in January, 1991. In addition, she also complained to Commissioner Carmichael about Weltz' performance in 1989. It is undisputed that Marshall contacted the county attorney, Brian Hurley, about the misconduct which she witnessed prior to her termination in March, 1991. It also is undisputed that after

Attorney Hurley refused to take action, Marshall reported the allegations to Putz' attorney, Gerald Bishop.

By going to Commission members and to Commissioner Carmichael with her complaints about Weltz, and by going to the county attorney about the charges in the Putz matter, Marshall took her allegations to "authorities who had the prosecutorial authority to investigate them. This lends a public air to these complaints." *Breuer*, 909 F.2d at 1038. Unlike other reported cases, the present case does not involve the distribution of an intraoffice memorandum, a secretly recorded private conversation, or communications by other means that would indicate that the speaker intended the speech to address a purely private concern. *See Connick*, 461 U.S. at 148, 103 S.Ct. at 1690-91; *Breuer*, 909 F.2d at 1038; and *Barkoo*, 901 F.2d at 618-19. Therefore, the form of the speech in the present case indicates that the speech was intended to reach matters of public concern.

3. Context

To determine the context of the statements, the court must look to the facts in the light most favorable to the plaintiff. Marshall initially reported Weltz' misconduct shortly after his appointment in 1989, and continued to complain to members of the Plan Commission through 1990. From the record, it is undisputed that the matter initially arose as an employment dispute between Marshall and Weltz. Several witnesses testified in their depositions that Marshall and Weltz did not get along. Marshall testified that Weltz was "out to get her job" and that Weltz often acted beyond his authority. (Deposition of Elizabeth Marshall, pp. 67-69)

In *Breuer*, the Seventh Circuit recently stated:

> This Court has emphasized, however, that the motive behind the employee's speech, while relevant to the public concern inquiry, is not dispositive. . . . The finding that a speaker was motivated by narrow self-interest may in itself strongly suggest that his speech involved a private dispute. Yet such a finding alone cannot disqualify a speaker from protection. Wrongdoing may often be revealed to the proper authorities only by those who have some personal stake in exposing wrongdoing. This Court has recently recognized that " '*content is the greatest single factor in the Connick inquiry.*' " *Belk*, 858 F.2d at 1264 (*quoting Berg v. Hunter*, 854 F.2d 238, 243 (7th Cir. 1988)) . . . In *Connick* itself, the Court considered one of the plaintiff's allegations to be of public concern in spite of the Court's finding that her grievances were firmly rooted in a personal dispute over her transfer. "*Connick* makes clear that even amid the strife of personal dispute, an employee's speech may touch upon matters of public concern necessitating the use of *Pickering's* balancing test." *Berg*, 854 F.2d at 242 . . .
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> 909 F.2d at 1038-39

In addition, although an employee's allegations may have arisen as a personal matter, the personal nature of the dispute will not by itself prevent the speech from being considered as a matter of public concern where there are allegations that a public official breached the public trust. *Breuer*, 909 F.2d at 1039.

In the instant case, it is clear that the conflict between Marshall and Weltz started as an employment dispute. An executive meeting was held on December 11, 1990, to resolve the differences between Weltz and Marshall. However, within a month after the executive meeting, the Plan Commission reappointed Marshall for only a limited

term. In addition, within one month after Marshall met with Putz' attorney and disclosed the activities of the Zoning Board that she had witnessed, the Plan Commission terminated her appointment. Since it is clear that Marshall's limited reappointment may have arisen as a result of her complaints about Weltz and that her termination may have resulted from her actions in the Putz matter, the context of Marshall's speech indicates that it was of public concern.

Balancing the Protected Speech Against the Government's Interest

In *Pickering*, the Supreme Court stated that once the speech was determined to be a matter of public concern,

> [t]he problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.
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> 391 U.S. at 568, 88 S.Ct. at 1734-35

The Supreme Court then stated that:

> Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their supervisors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, . . . we shall indicate some of the general lines along which an analysis of the controlling interests should run.
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> 391 U.S. at 569, 88 S.Ct. at 1735

See also Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1258 (7th Cir. 1985).

In a more recent case, the Supreme Court has delineated more clearly the factors to be considered:

> We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.
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> *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899, 97 L.Ed.2d 315 (1987) (*citing Pickering*, 391 U.S. at 570-573)

See also Patkus, 769 F.2d at 1258; and *Yoggerst v. Stewart*, 623 F.2d 35, 40 (7th Cir. 1980). In assessing the *Pickering* factors, each case must be addressed on its own facts.

The first *Pickering* factor, the need to maintain discipline, and the third, the need to curtail conduct which impedes the employee's work performance, clearly are applicable to the present case. The employer bears the burden of showing that the employee was disruptive. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734.

Donald Bengel stated in his deposition that Marshall and Weltz did not get along well within the office. (Deposition of Donald Bengel, p. 6) Although Marshall stated that she did not like the atmosphere at work because of the tension between her and Weltz, she did not think that the tension affected her job performance. (Deposition of Elizabeth Marshall, pp. 73-74) James Brown stated in his deposition that Marshall effectively performed her duties as Executive Secretary while he served as President of the Plan Commission from January, 1989, through January, 1991. (Deposition of James Brown, pp. 3, 34) Robert

Detert stated that he was unaware of any personnel problems between Marshall and any other staff members. (Deposition of Robert Detert, p. 23)

There is no evidence in the record that Marshall's allegations against the Zoning Board caused any interference with her job performance. Although there is evidence that Marshall had some difficulties with Weltz, there is no indication that Marshall's speech was "reasonably calculated to create disharmony or to have impaired discipline." *Yoggerst*, 623 F.2d at 40. In addition, where the interference caused by the employee is *de minimis*, the employer's interest is not sufficiently persuasive to outweigh First Amendment rights. *Conner v. Reinhard*, 847 F.2d 384, 391 (7th Cir. 1988). The Seventh Circuit acknowledged in *Conner* that

> an insubordinate act by one worker potentially could have an undesirable effect on office harmony and discipline. Nevertheless, the defendants have not provided us with any evidence of actual harmful effects resulting from [the plaintiff's] alleged insubordination. Thus, the potential for office disciplinary problems in this case is not sufficiently "persuasive" for us to conclude that this factor outweighs [the plaintiff's] interest in free speech.
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> 847 F.2d at 390

See also Biggs, 892 F.2d at 1303. Since the defendants have not presented any evidence that Marshall actually disrupted the work environment or seriously jeopardized discipline, it does not appear that Marshall's speech interfered with her ability to perform her job.

The second and fourth *Pickering* factors also do not support a restriction on Marshall's First Amendment rights. The second factor is the need for confidentiality, and the fourth factor is concerned with the need to encourage a

close and personal relationship between the employee and his superiors where that relationship calls for loyalty and confidence. *See Connick*, 461 U.S. at 140, 103 S.Ct. at 1686; *Breuer*, 909 F.2d at 1041; *Domiano*, 904 F.2d at 1145; and *Biggs*, 892 F.2d at 1303-04.

In the instant case, Marshall stated that she and Weltz could effectively perform their jobs without having to deal directly with each other. (Deposition of Elizabeth Marshall, pp. 66-67) Larry Sheets stated that some of the Plan Commission members told him that they felt uncomfortable with Marshall after her actions in the Putz matter. (Deposition of Larry Sheets, pp. 33-34) However, "the court may only consider evidence and statements that would be admissible at trial and that have probative force." *Colan v. Cutler-Hammer, Incorporated*, 812 F.2d 357, 365 n.14 (7th Cir. 1987). *See also Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989) (to withstand a motion for summary judgment, the supporting materials must contain more than allegations that the defendants acted willfully); and *First National Bank Company v. Insurance Company of North America*, 606 F.2d 760, 766 (7th Cir. 1979). Since Larry Sheets' statement would be inadmissible hearsay at trial, it cannot be considered in determining a motion for summary judgment.

Therefore, the defendants have failed to establish that a close working relationship between Marshall and either Weltz or the members of the Plan Commission was "essential to fulfilling public responsibilities, [making] a wide degree of deference to the employer's judgment . . . appropriate." *Connick*, 461 U.S. at 152, 103 S.Ct. at 1692. Although the Plan Commission made a finding that they lacked confidence in Marshall and that she was failing to comply with their instructions, that conclusion is not supported by the evidence in the record. Since there is no

evidence that Marshall's speech interfered with her productivity or with the productivity of other employees, or that Marshall was required to have a close and personal working relationship with either Weltz or the Plan Commission members to perform her job efficiently, her speech remains protected under the circumstances of this case.

Finally, the defendants contend that since Marshall held a policymaking position, she could be discharged because of her speech. The defendants rely on various cases which state that a policymaking official can be discharged based on her First Amendment association rights. *See Matlock v. Barnes*, 932 F.2d 662, 663 (7th Cir. 1991); *Uptown v. Thompson*, 930 F.2d 1209, 1215 (7th Cir. 1991); *Griffin v. Thomas*, 929 F.2d 1210, 1214 (7th Cir. 1991); and *Lohorn v. Michael*, 913 F.2d 327, 334 (7th Cir. 1990). However, the defendants have failed to cite any authority, nor has this court been able to find any authority, to support an extension of these political patronage discharge cases to cases involving freedom of speech claims.

In political patronage cases involving confidential or policymaking positions, the Supreme Court has determined that the employee can be fired simply based on her political affiliation. *See Branti v. Finkel*, 445 U.S. 507, 517, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574 (1980); and *Elrod v. Burns*, 427 U.S. 347, 367, 96 S.Ct. 2673, 2687, 49 L.Ed. 2d 547 (1976). The employer is not required to show that retaining the employee will have an adverse effect on the working relationship. However, in freedom of speech cases, the *Pickering* analysis grants a policymaking employee protection under the First Amendment if her speech concerns a matter of public concern. The confidential nature of the job is only one of several factors to be considered in making the *Pickering* balancing.

It has been held by the Supreme Court that there is no hierarchy among First Amendment expression rights. *See McDonald v. Smith*, 472 U.S. 479, 485, 105 S.Ct. 2787, 2791, 86 L.Ed.2d 394 (1985); and *Griffin*, 929 F.2d at 1213. This court recognizes that by applying a *Pickering* speech analysis instead of an *Elrod* political patronage analysis, a plaintiff's speech rights gain more protection than her affiliation rights. However, since the instant case has been presented solely as a speech case, the *Elrod* test does not apply. Since no authority exists to support the argument that a policymaking figure can be discharged based on her speech, Marshall's policymaking status does not outweigh her First Amendment right of free speech, and her speech remains protected.

However, the determination that Marshall's speech was protected by the First Amendment—a determination made by the court as a matter of law—is not the end of inquiry. It is for the trier of fact to determine whether the employee's speech was a substantial or motivating factor in the employer's decision to terminate her. If the employee meets the burden, the employer must present evidence to show that the termination would have occurred absent the employee's exercise of her First Amendment rights. *Belk*, 858 F.2d at 1262 n.6; and *Knapp v. Whitaker*, 757 F.2d 827, 843 (7th Cir. 1985). *See also Fleming v. County of Kane*, 898 F.2d 553, 556 (7th Cir. 1990). Therefore, the jury must determine whether Marshall's speech was a motivating or substantial factor for termination, and the defendants are entitled to put forth evidence to show that Marshall would have been terminated absent her protected speech.

Due Process—Liberty Interest

A public employee is not entitled to a due process hearing unless the termination of her job involves a deprivation of property or liberty. The employee's liberty interests become involved if the government decides to discharge an employee and "makes any charge against [the employee] that might seriously damage [her] standing and associations within the community" or "impose[s] on [her] a stigma or other disability that foreclose[s] [her] freedom to take advantage of other employment opportunities." *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972). *See also Johnson v. Martin*, 943 F.2d 15, 16 (7th Cir. 1991); *Hannon v. Turnage*, 892 F.2d 653, 660 (7th Cir. 1990); *Ratliff v. City of Milwaukee*, 795 F.2d 612, 625 (7th Cir. 1986); and *Munson v. Friske*, 754 F.2d 683, 693 (7th Cir. 1985). In the instant case, the reasons for the discharge were that Marshall was withholding information, that the Plan Commission members lacked confidence in Marshall, that Marshall was not treating everyone equally, that Marshall was failing to comply with Plan Commission members' instructions, and that Marshall was failing to check for completeness on items submitted to the Technical Advisory Group. (Plaintiff's Deposition Exhibit 8, attached to Defendants' Statement of Material Facts).

In *Munson*, the Seventh Circuit stated:

> Liberty is not infringed by a label of incompetence or a failure to meet a specific level of management skills, which would only affect one's professional life and force one down a few notches in the professional hierarchy.
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> 754 F.2d at 693

See also Ohse v. Hughes, 811 F.2d 1144, 1150 (7th Cir. 1987); and *Lawson v. Sheriff of Tippecanoe County*, 725

F.2d 1136, 1138 (7th Cir. 1984). In the instant case, the reasons for Marshall's dismissal clearly relate to her professional skills and are not sufficiently stigmatizing to require a name-clearing hearing. In fact, if Marshall was entitled to a name clearing hearing based upon the reasons given for her discharge, no at-will public could be fired without a hearing based upon general allegations of poor job performance. Therefore, summary judgment is appropriate on the Fourteenth Amendment claim.

Qualified Immunity

The defendants contend that they are entitled to qualified immunity. Qualified immunity may be granted to a governmental official who was performing a discretionary function and his conduct did not violate clearly established federal statutory or constitutional rights which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Qualified immunity is available only to public officials sued in their individual capacities. *Hadi v. Horn*, 830 F.2d 779, 782 (7th Cir. 1987). The Seventh Circuit has held that the plaintiff bears the burden of establishing the existence of a constitutional or federal right. *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988).

In this case, the court has determined that Marshall's speech was protected by the First Amendment because it dealt with a matter of public concern. In *Green v. Carlson*, 826 F.2d 647 (7th Cir. 1987), the court stated that

> in order to determine whether the law was clearly established at the time of the defendant's alleged violation, a court cannot look at the legal norm at issue in the abstract. Rather, the test for qualified immunity is "whether the law was clear in relation to the specific facts confronting the public official when [he or she] acted."

826 F.2d at 649 (*quoting Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987))

See also Anderson v. Creighton, 483 U.S. 635, 640 n.2, 107 S.Ct. 3034, 3039 n.2, 97 L.Ed.2d 523 (1987).

At the time Marshall was discharged, *Elrod* clearly stated that a policymaking official could be terminated from her employment without violating her First Amendment right of association. In applying the *Pickering* balance test, one of the factors which the court must consider is whether the plaintiff held a confidential or policymaking position. Additionally, the Supreme Court has determined that there is no hierarchy of First Amendment rights. *See McDonald*, 472 U.S. at 485, 105 S.Ct. at 2791; and *Griffin*, 929 F.2d at 1213. When Marshall was discharged on March 13, 1991, the law was not clearly established that Marshall could not be discharged from her policymaking position based upon her public comments. Therefore, the county officials are entitled to qualified immunity for the claims brought against them in their individual capacities.

For the reasons set forth above, the Motion for Summary Judgment filed by the defendants, Porter County Plan Commission, Porter County, Donald Bengel, Richard Burns, Robert Detert, James Eriksson, James Fike, Ruth Ann McWhorter, and Jane Pecor, on March 9, 1992, is GRANTED as to the claims based upon the due process clause of the Fourteenth Amendment and as to any claims against them in their individual capacities. In all other respects, it is DENIED.

ENTERED this 18 day of June, 1992.

/s/ Andrew P. Rodovich
United States Magistrate Judge